In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-322

LOUIS VERNELL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of willful failure to file income tax returns for the years 1967 through 1971, in violation of 26 U.S.C. 7203. He was sentenced to concurrent nine-month sentences and fined $5,000 (Pet. App. C 7-8).[1] The court of appeals affirmed (Pet. App. A).

[1] "R." refers to the original record filed in the court of appeals.

The pertinent facts are as follows: Petitioner stipulated that he was required by law to file income tax returns for each of the years; that he did not do so until May 1973, after the Treasury agents' investigation had begun; and that his gross income was substantially that charged for each year, *i.e.*, $72,826 in 1967, $42,086 in 1968, $34,275 in 1969, $50,774 in 1970, and $44,774 in 1971 (R. 29, 47, 74; Pet. App. B 2-6). During the investigation petitioner advised the agents that he had been too busy trying to make money to file the returns (R. 59, 61). At trial, petitioner testified that he had practiced law for 23 years and that he had not filed his tax returns on time because he had been too busy in his law practice (R. 112, 115-116, 121).

1. Petitioner contends that the trial court erred in instructing the jury as to willfulness. The trial court instructed the jury as follows (R. 230-231):

> The word "willfully," as used in this statute and in this information, means a voluntary and intentional violation of a known legal duty. Therefore, an act is done willfully if it is done knowingly, voluntarily and intentionally, and with the specific intent to do something which the law forbids, that is to say, with bad purpose either to disobey or to disregard the law.
>
> Conversely, an omission or failure to perform an act required by the law is willful if the defendant knew the act was required by the law, and if the defendant voluntarily and intentionally and without justifiable cause failed to perform the legally required act, that is to say, the

> nonperformance of the required act resulted from a specific intent on the part of the defendant to disobey or to disregard the law in question.

Petitioner argues (Pet. 7-12) that this instruction conflicts with *United States* v. *Bishop*, 412 U.S. 346; *United States* v. *Murdock*, 290 U.S. 389; and *United States* v. *Pohlman*, 510 F.2d 414 (C.A. 8). In *Bishop*, this Court held that the word "willful" in the criminal tax statutes "connotes a voluntary, intentional violation of a known legal duty" (412 U.S. at 360). The instruction of the trial court is in complete accord with the *Bishop* definition of "willful." Nothing in that case requires that the trial court employ any particular words in its instructions to the jury on willfulness.

Similarly, the trial court's instruction does not conflict with *United States* v. *Murdock*, 290 U.S. 389. There the defendant was charged with willful failure to supply information requested by the Internal Revenue Service. The Court held that the criminal sanction for such conduct did not apply to one whose refusal to give requested information was based upon his *bona fide*, though mistaken, understanding of his constitutional protection against self-incrimination. Since the scope of the privilege was uncertain at the time of the defendant's refusal to supply the requested information, the Court held that the defendant was entitled to an instruction that the jury should consider whether his conduct was based upon his good faith belief that the privilege was

applicable. While the Court in *Murdock* formulated the requirement of willfulness in terms of "bad faith or evil intent" (290 U.S. at 398), nothing in that case requires that the trial court employ those precise words in its instructions to the jury. As the Court pointed out in *Bishop* (412 U.S. at 360-361), the *Murdock* definition of willfulness is synonymous with the "voluntary, intentional violation of a known legal duty" standard applied by the trial court in this case. Both formulations are designed to "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers" (412 U.S. at 361). See also *Cooley* v. *United States*, 501 F. 2d 1249, 1253, n. 4 (C.A. 9), certiorari denied, 419 U.S. 1123; *United States* v. *Hawk*, 497 F. 2d 365 (C.A. 9), certiorari denied, 419 U.S. 838; *United States* v. *Matosky*, 421 F. 2d 410, 412 (C.A. 7), certiorari denied, 398 U.S. 904; *Lumetta* v. *United States*, 362 F. 2d 644 (C.A. 8).

Finally, the panel decision in *United States* v. *Pohlman*, 510 F. 2d 414 (C.A. 8), relied upon by petitioner, was reversed by the court *en banc*, which held that the "trial court's instruction on willfulness * * * fairly and adequately charged the jury as to what the Government had to establish to support a conviction." *United States* v. *Pohlman*, No. 74-1759, decided August 27, 1975, slip op. 7, petition for a writ of certiorari pending, No. 75-483.

2. Petitioner further argues (Pet. 13-16) that there was a variance between the information and the proof concerning the time his tax returns were

due. The information alleged that the due date was April 15 of each year. Petitioner urges, however, that the evidence established that he had requested extensions for each year. Apart from the fact that petitioner did not raise this point at trial when the information could have been amended to take into account any requested extensions (see Rule 7(e) of the Federal Rules of Criminal Procedure), petitioner stipulated that he had not filed the returns at issue (R. 29). That admission makes the alleged variance irrelevant.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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